Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JOE FREEMAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

---

PETITION FOR WRIT OF CERTIORARI

FREDERICK F. COHN
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Chicago, Illinois 60601
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Attorney for Petitioner

QUESTION PRESENTED

1. Was defendant denied counsel of his choice under the Sixth Amendment to the United States Constitution, where before he elected to remain with counsel, who was also going to be a witness, he was never advised by the trial court or counsel that continuing to be represented by counsel, who would be a witness, was fraught with dangers and disadvantages and looked on by the legal profession with disfavor?

PARTIES INVOLVED

Petitioner, Joe Freeman, was the defendant in the Circuit Court of Cook County, petitioner in the Circuit Court of Cook County in a post-conviction proceeding, appellant in the Appellate Court of Illinois, First Judicial District, and petitioner in the Supreme Court of Illinois in a Petition for Leave to Appeal.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, respondent in the Circuit Court of Cook County in a post-conviction proceeding, appellee in the Appellate Court of Illinois, First Judicial District, and respondent in the Supreme Court of Illinois in a Petition for Leave to Appeal.

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by counsel, who would be a witness, was fraught with dangers and disadvantages and was looked on by the legal profession with disfavor. Defendant subsequently stated that if he had been so advised, he would have chosen other counsel. His right to counsel was denied because under the Strickland v. Washington, 466 U. S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) standard, he must prove prejudice. He need not prove prejudice if he is denied counsel of his choice. United States v. Gonzalez-Lopez, 126 S.Ct. 2557, 165 L.Ed.2d 409 10

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B. Order of the Supreme Court of Illinois denying Petition for Leave to Appeal dated November 29, 2006.....App. 8

C. Order of the Appellate Court of Illinois, First District decided on July 27, 2004 .....App. 9

JUDGMENT BELOW

The Order of the Appellate Court of Illinois, First Judicial District, dated May 16, 2006 is attached as Appendix A to this Petition.

The denial of Petition for Leave to Appeal is attached as Appendix B to this Petition.

The Order of the Appellate Court of Illinois, First Judicial District, dated July 27, 2004 is attached as Appendix C to this Petition.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, Joe Freeman, (hereafter, petitioner, or defendant), prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming the dismissal of his post-conviction assertion that he was denied his constitutional right to counsel of his choice.

JUDGMENT AND OPINION BELOW

The Order of the Appellate Court of Illinois, First District is set out as App. A.

The Order of the Supreme Court of Illinois denying Petition for Leave to Appeal on November 29, 2006, Case No. 102898 is set out as App. B.

The Order of the Appellate Court of Illinois, First District is set out as App. C.

JURISDICTIONAL STATEMENT

Jurisdiction in the Appellate Court of Illinois, First District was based on Illinois Supreme Court Rule 603.

Jurisdiction in the Supreme Court of Illinois was based on Illinois Supreme Court Rule 603 and 615, which provides that appeals from final orders of the Appellate Court of Illinois, First District shall be taken to the Supreme Court of Illinois.

The judgment of the trial court was affirmed on May 16, 2006.

Petition for Leave to Appeal was denied on November 29, 2006.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under Rules 10(b), 12 and 13 of this Court.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution reads:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> "Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws."

STATEMENT OF THE CASE

Defendant was charged with attempt murder. He was tried in a bench trial. During trial, his lawyer, Robert Nemzin, desired to testify that Gregory, the complainant-alleged victim, tried to solicit a bribe to change his testimony. The State objected to counsel testifying and continuing to represent defendant. A hearing was held. The trial court permitted counsel to be both a witness and trial counsel with some of the proceeding being handled by co-counsel, Nemzin's partner.

Defendant was convicted and sentenced to 25 years.

On appeal, defendant asserted he was denied effective assistance of counsel. The Appellate Court affirmed, holding:

> "We agree Nemzin should have withdrawn as Freeman's attorney when he realized he would be called as a witness to the conversation with Gregory. However, there was no prejudice to the defendant in this case." (App. 23)

The court held there was no prejudice under Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674.

Defendant filed a Post-Conviction Petition asserting there was prejudice, but more importantly, defendant was denied counsel of his choice.

In his Post-Conviction Petition, defendant asserted:

"Defendant was denied effective assistance of trial counsel and was erroneously denied counsel of his choice when Attorney Nemzin continued to represent defendant even after it became apparent that he would be required to be a witness during the trial; and neither the court nor Attorney Nemzin nor [his partner] Attorney Hickey adequately explained to defendant that such an act was fraught with potential pitfalls."

Defendant submitted his Affidavit that read:

"Prior to the start of trial, I was never advised of problems of a conflict of interest if Attorney Nemzin represented me and also acted as a witness. Neither of my attorneys ever discussed or even mentioned these issues to me, not on or after November 8, 2000. The word 'conflict' was never uttered by Nemzin nor Hickey.

On November 8, 2000, after Charles Gregory propositioned Nemzin in the hall, Nemzin went to let the ASA know what happened. Nemzin came and told me that he would be a witness and that he may let Hickey lead during trial, but he would still be representing me.

I asked why. He said it was complicated, but there was nothing to worry about. So I didn't and that was it. During my visits with both my attorneys at the jail, the issue of a constitutionally valid waiver was never discussed or mentioned by

> either of my attorneys, not when Nemzin came by himself or when Hickey came by himself or when they came together. I was never advised by anyone about anything prior to trial.
>
> On the day I was found guilty, both my lawyers came to the holding pen where I asked them questions about the trial, one of which was what was wrong. Why did the judge ask me those questions? Hickey said, 'She asked those questions cause she wanted to know if you were okay with us representing you! But I assure you nothing was wrong.' Nemzin agreed and that was it.
>
> If it was explained to me prior to trial that having Attorney Nemzin continue to represent me and be a witness would cause an issue as to Attorney Nemzin's credibility, I would have desired to obtain different counsel. Because Attorney Nemzin is in partnership with Attorney Peter Hickey, I would also not have permitted Attorney Peter Hickey to continue as my counsel."

He also submitted the Affidavit of Attorney Robert Nemzin that reads in part:

> "That prior to trial, I did not advise Mr. Freeman of any problems or potential conflicts of interest should I testify in the matter while also remaining as trial counsel."

The trial court dismissed the Post-Conviction Petition

without a hearing, asserting:

> "Additional affidavits were filed on today's date. The Court has reviewed them. The Petitions are denied as being frivolous and without merit, res judicata."

The State Appellate Court, although discussing finding of res judicata, actually decided the case on the merits. The court stated:

> "Moreover, defendant's claim that he was denied counsel of his choice is belied by the record. In our prior order, we noted that the trial court asked defendant if he objected to Nemzin acting as both a witness and his attorney, and defendant said that he did not. Specifically, the record shows that during a lengthy colloquy, the following exchange occurred:
>
> 'THE COURT: No complaints, whatsoever, about Mr. Nemzin being a witness and now acting as your attorney?
>
> THE DEFENDANT: No, your Honor.
>
> THE COURT: Are you sure?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: 100 percent positive?
>
> THE DEFENDANT: Yes, your Honor.'

The trial court overruled the state's objection to counsel acting as a witness and as defendant's attorney, and explicitly stated:

'Mr. Freeman has a right to be represented by whom he chooses. He has chosen him.

He has retained Mr. Nemzin and Hickey. He is 100 percent satisfied with their service. He wants to proceed with Mr. Nemzin and Hickey over the State's objection. I will let Mr. Nemzin proceed as he has been as co-counsel in any capacity he so chooses.'

We therefore reject defendant's claim that he was denied counsel of his choice."

RAISING THE FEDERAL QUESTION BELOW

The assertion that defendant was denied counsel of his choice was raised in the trial court.

This issue was raised on appeal to the Appellate Court of Illinois and the Supreme Court of Illinois.

REASON FOR GRANTING CERTIORARI

1.

Defendant was denied counsel of his choice under the Sixth Amendment to the United States Constitution, where before he elected to remain with counsel, who was also going to be a witness, he was never advised by the trial court or counsel that continuing to be represented by counsel, who would be a witness, was fraught with dangers and disadvantages and was looked on by the legal profession with disfavor. Defendant subsequently stated that if he had been so advised, he would have chosen other counsel. His right to counsel was denied because under the Strickland v. Washington, 466 U. S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) standard, he must prove prejudice. He need not prove prejudice if he is denied counsel of his choice. United States v. Gonzalez-Lopez, 126 S.Ct. 2557, 165 L.Ed.2d 409.

Following a bench trial, defendant was convicted of attempted first degree murder and sentenced to 25 years' imprisonment. On direct appeal, defendant raised *inter alia*, contention of ineffective assistance of trial counsel that one of his retained attorneys, Robert Nemzin, rendered ineffective assistance when he testified as a defense witness while continuing to represent defendant. The other defense counsel was the law partner of Attorney Nemzin.

The Appellate Court in the direct appeal stated:

"II. Ineffective Assistance

Freeman contends he received ineffective assistance of counsel when Nemzin testified as a defense witness while continuing to represent Freeman at trial....

We evaluate ineffective assistance of counsel claims using the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984): (1) whether counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different....

We agree Nemzin should have withdrawn as Freeman's attorney when he realized he would be called as a witness to the conversation with Gregory. However, there was no prejudice to the defendant in this case." (App. 22-23)

Defendant filed a collateral attack on his conviction under the State Post-Conviction Hearing Act, 725 ILCS 5/122-1, *et seq.*

The Appellate Court summarized what occurred as follows:

"In his petition, defendant alleged that he was denied

effective assistance of counsel and counsel of his choice when Nemzin continued to represent him after it became apparent that he would need to testify as a witness. Defendant asserted that neither the trial court nor Nemzin adequately explained to him that such action was 'fraught with potential pitfalls.'...

Attached to defendant's petition was his affidavit in which he stated that counsel never explained the conflict of interest to him, and if he had been advised that the dual roles created an issue with Nemzin's credibility, he would have desired to obtain different counsel. Defendant subsequently submitted an affidavit from Nemzin in which Nemzin acknowledged that he did not advise defendant of any potential conflicts of interest, but that the issue arose during trial, that it was discussed on the record, and after inquiry by the trial court, defendant indicated that he wanted Nemzin to continue as his attorney." (App. 3)

The Appellate Court ruled:

> "Moreover, defendant's claim that he was denied counsel of his choice is belied by the record. In our prior order, we noted that the trial court asked defendant if he objected to Nemzin acting as both a witness and his attorney, and defendant said that he did not. Specifically, the record shows that during a lengthy colloquy, the following exchange occurred:
>
> 'THE COURT: No complaints, whatsoever, about Mr. Nemzin being a witness and now acting

as your attorney?

THE DEFENDANT: No, your Honor.

THE COURT: Are you sure?

THE DEFENDANT: Yes, your Honor.

THE COURT: 100 percent positive?

THE DEFENDANT: Yes, your Honor.'

The trial court overruled the state's objection to counsel acting as a witness and as defendant's attorney, and explicitly stated:

'Mr. Freeman has a right to be represented by whom he chooses. He has chosen him.

He has retained Mr. Nemzin and Hickey. He is 100 percent satisfied with their service. He wants to proceed with Mr. Nemzin and Hickey over the State's objection. I will let Mr. Nemzin proceed as he has been as co-counsel in any capacity he so chooses.'

We therefore reject defendant's claim that he was denied counsel of his choice." (App. 5-6)

It is obvious that the slight questioning of defendant by the trial court, especially when joined by defense counsel's affidavit that "he did not advise defendant of any potential

conflict of interest," did not demonstrate a knowing and intelligent waiver of counsel of choice. Because of the lack of pre-trial advice, a failure of full admonishments, there is reason to believe defendant's affidavit where defendant stated "if he had been advised that the dual roles created an issue with Nemzin's credibility, he would have desired to obtain different counsel." (App. 3)

The State Appellate Court's deciding the case on a Strickland, supra, standard and holding that there was knowing waiver of counsel of choice is erroneous.

The colloquy between the court and defendant with no full explanation of the problems of such lawyer-witness representation is devoid of sufficient explanation to defendant of the problems in such situation.

The conversation between the court and defendant was not sufficient waiver of defendant's right to conflict-free counsel. Proof is lacking that there was a knowing waiver. Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed.2d 1461 (1938).

The procedure here was too fast and failed to ensure a knowing waiver by defendant. Compare, as it relates to waiver of conflict-free counsel, United States v. Curcio, 680 F.2d 881, 888-89 (2 Cir. 1982) (purported waiver of conflict-free counsel invalid; simple answers to court's conclusory questions as to defendant's understanding, without explanation by court or by defendant, and without court ascertaining defendant understood nature of right purportedly waived).

As with a waiver of counsel, i.e., self-representation, an accused before making a choice to remain with a possibly impaired counsel must be informed of the "dangers and disadvantages" of a counsel who is also going to be a witness and that the legal profession looks upon such activity with disfavor. Cf. Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562 (1975).

Burden of proof on knowing waiver is on prosecution. Ford v. Wainwright, 526 F.2d 919 (5 Cir. 1976).

Because the trial court failed to sufficiently admonish defendant as to the problems with a lawyer-witness, defendant was denied counsel of choice. Hence, to obtain a new trial he need not prove prejudice. United States v. Gonzalez-Lopez, 126 S.Ct. 2557, 165 L.Ed.2d 409. Defendant's constitutional right to counsel under the Sixth Amendment was denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

APPENDIX A

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

SECOND DIVISION
May 16, 2006

No. 1-05-1430

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 01 CR 777
JOE FREEMAN,	)	Honorable Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Defendant Joe Freeman appeals from an order of the circuit court of Cook County summarily dismissing his post-conviction petition as frivolous and patently without merit. On appeal, defendant contends that the circuit court erred in dismissing his petition because it stated the gist of a meritorious constitutional claim of ineffective assistance of trial counsel. We affirm.

Following a bench trial, defendant was convicted of attempted first degree murder and sentenced to 25 years' imprisonment. On direct appeal, defendant raised *inter alia*, seven contentions of ineffective assistance of trial counsel, including a claim that one of his retained attorneys, Robert Nemzin rendered ineffective assistance when he testified as a defense witness while continuing to represent defendant. This court agreed that Nemzin should have withdrawn as defendant's attorney, but found that Nemzin testified favorably on defendant's behalf and that defendant did not suffer any prejudice. We noted that the trial court asked defendant if he objected to Nemzin acting as a witness and as his attorney, and defendant said that he did not. Defendant also claimed on direct appeal that counsel was ineffective for failing to call his brother as an alibi witness. This court rejected all of defendant's contentions of ineffective assistance of counsel, as well as the other issues raised in his direct appeal, and affirmed the trial court's judgment. People v. Freeman, No. 1-03-0059 (2004) (unpublished order under Supreme Court Rule 23).

On February 15, 2005, defendant, through private counsel, filed the instant petition for relief under the Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.* (West

2004). In his petition, defendant alleged that he was denied effective assistance of counsel and counsel of his choice when Nemzin continued to represent him after it became apparent that he would need to testify as a witness. Defendant asserted that neither the trial court nor Nemzin adequately explained to him that such action was "fraught with potential pitfalls." Defendant acknowledged our ruling on direct appeal, but argued that this court was incorrect in finding that he was not prejudiced. He alleged that he suffered prejudice because Nemzin's credibility was weakened by his continued representation; therefore, allowing counsel to represent him and appear as a witness violated his right to effective assistance of counsel. Defendant also alleged that counsel's failure to call Assistant State's Attorney (ASA) Smitka as a witness to corroborate Nemzin's testimony constituted ineffective assistance of counsel.

Attached to defendant's petition was his affidavit in which he stated that counsel never explained the conflict of interest to him, and if he had been advised that the dual roles created an issue with Nemzin's credibility, he would have desired to obtain different counsel. Defendant subsequently submitted an affidavit from Nemzin in which Nemzin acknowledged that he did not advise defendant of any potential conflicts of interest, but that the issue arose during trial, that it was discussed on the record, and after inquiry by the trial court, defendant indicated that he wanted Nemzin to continue as his attorney. Defendant also attached to his petition this court's order on direct appeal and portions of the trial transcript. The circuit court found that the issues raised in defendant's post-conviction petition

were barred by the doctrine of *res judicata* and summarily dismissed the petition as frivolous and patently without merit.

On appeal, defendant contends that the circuit court erred in dismissing his petition because it stated the gist of a meritorious constitutional claim of ineffective assistance of trial counsel. Defendant argues that he was not properly warned of the consequences of proceeding with counsel who also was required to testify, and thus, he was denied counsel of his choice. Defendant claims that this contention is not barred by *res judicata* because, although some of the facts are contained in the trial record, others are not. He also asserts that appellate counsel was ineffective for failing to raise the issues on direct appeal. In addition, defendant maintains that he did not knowingly waive his right to conflict-free counsel, and that he would have obtained different counsel if someone had told him that Nemzin's credibility would be adversely affected by his dual role.

The state argues that this issue was thoroughly addressed by this court on direct appeal, and therefore, is barred by *res judicata* in this post-conviction proceeding. The State also contends that the issue is waived because defendant is attempting to add a new twist to the issue by asserting that he was never fully informed of the consequences of counsel acting in a dual role, and he should have raised that claim on direct appeal with his other seven claims of ineffective assistance of counsel. Alternatively, the state argues that defendant's claim is without merit because he failed to show that counsel's performance was deficient.

Our review of the circuit court's summary dismissal of defendant's post-conviction petition is *de novo*. People v. Coleman, 183 Ill. 2d 366, 388-89 (1998). Post-conviction proceedings are confined to issues that were not, and could not have been, raised on direct appeal. People v. Williams, 209 Ill. 2d 227, 232-33 (2004). The doctrine of *res judicata* bars consideration of any issues that were determined on direct appeal, while any issues that could have been raised, but were not, are deemed forfeited. People v. Blair, 215 Ill. 2d 427, 443-44 (2005).

Here, we find that defendant's allegation that he was denied effective assistance of counsel and counsel of his choice when Nemzin testified as a witness and continued to represent him is substantially the same as the issue he raised on direct appeal, and thus, is barred by *res judicata*. In his petition, defendant expresses disagreement with this court's disposition on direct appeal and attempts to rephrase his argument in other terms. As we stated in our prior order, although Nemzin should have withdrawn as defendant's counsel when he realized that he would be called as a witness, defendant was not prejudiced by counsel's dual role in this case. Freeman, No. 1-03-0059, order at 16.

Moreover, defendant's claim that he was denied counsel of his choice is belied by the record. In our prior order, we noted that the trial court asked defendant if he objected to Nemzin acting as both a witness and his attorney, and defendant said that he did not. Specifically, the record shows that during a lengthy colloquy, the following exchange occurred:

> "THE COURT: No complaints, whatsoever, about Mr. Nemzin being a witness and now acting as your attorney?
>
> THE DEFENDANT: No, your Honor.
>
> THE COURT: Are you sure?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: 100 percent positive?
>
> THE DEFENDANT: Yes, your Honor."

The trial court overruled the state's objection to counsel acting as a witness and as defendant's attorney, and explicitly stated:

> "Mr. Freeman has a right to be represented by whom he chooses. He has chosen him.
>
> He has retained Mr. Nemzin and Hickey. He is 100 percent satisfied with their service. He wants to proceed with Mr. Nemzin and Hickey over the State's objection. I will let Mr. Nemzin proceed as he has been as co-counsel in any capacity he so chooses."

We therefore reject defendant's claim that he was denied counsel of his choice. In addition, since the record shows that appellate counsel did, in fact, raise the issue on direct appeal, defendant's claim that appellate counsel was

ineffective for failing to do so is without merit.

Defendant also contends that there was merit in his post-conviction allegation that trial counsel rendered ineffective assistance because he failed to call ASA Smitka as a witness to corroborate Nemzin's testimony. We agree with the State that defendant could have raised this issue on direct appeal, as he did when he faulted counsel for failing to call his brother as an alibi witness. Since he failed to do so, we find that this claim is forfeited. See Blair, 215 Ill. 2d at 443-44. Here, defendant's post-conviction petition failed to allege a meritorious claim of ineffective assistance of counsel. We find the circuit court's summary dismissal of the petition was warranted.

For these reasons, we affirm the judgment of the circuit court of Cook County

Affirmed.

Wolfson, J., with South, and Hall, JJ., concurring.

APPENDIX B

No. 102898

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
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SPRINGFIELD, ILL. 62701
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November 29, 2006

Mr. Frederick F. Cohn
Attorney at Law
35 East Wacker Drive
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Chicago, IL 60601

No. 102898 - People State of Illinois, respondent, v. Joe Freeman, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Burke, J., took no part.

The mandate of this Court will issue to the Appellate Court on January 4, 2007.

APPENDIX C

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

SECOND DIVISION
July 27, 2004

No. 1-03-0059

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 01 CR 777
JOE FREEMAN,	)	Honorable Diane Gordon Cannon, Judge Presiding.
Defendant-Appellant.	)	

ORDER

Following a bench trial, defendant Joe Freeman was convicted of the attempt first degree murder of Charles Gregory and sentenced to 25 years in prison.

On appeal, Freeman contends: (1) the trial judge showed bias against him by interrupting defense counsel, showing impatience and hostility during closing arguments, and interrogating defense witnesses; (2) he received ineffective assistance of counsel when his counsel continued to represent him despite a conflict of interest; (3) his sentence was excessive where the court considered a pending unproved charge in aggravation; and (4) he was not found guilty beyond a reasonable doubt. We affirm.

FACTS

At trial, Gregory testified Freeman shot him on November 8, 2000, after the two argued at the criminal courthouse building on 26th Street and California Avenue. Gregory came to the courthouse with Richard Tyler to support a friend and to check the status of another case. The other case was an attempt murder/aggravated battery from June 27, 2000, in which Gregory was the victim and Freeman was one of the named defendants. Gregory had known Freeman since sometime in 2000 because their girlfriends were related.

Gregory saw Freeman leaving the courtroom and began to argue with him in the hallway. Freeman told him he was bogus for pressing charges in the June 27 incident. Tyler was standing a few feet away during the argument. Freeman's lawyer approached, and Gregory walked away.

The lawyer later approached Gregory and asked him if the state's attorney had told him to come in. Gregory said no. Gregory denied telling Freeman's counsel he would drop the charges against Freeman in exchange for money.

Gregory saw Freeman again outside the courthouse and argued with him again. Freeman proceeded to walk north, talking on his cell phone. Gregory and Tyler walked south to avoid Freeman then caught a northbound bus on California. They got off the bus at Madison and California and began to walk. A car pulled up alongside them on Monroe Street. Gregory could not see who was in the car. Gregory saw Freeman exit the car from the driver's side and point a gun at them. Freeman said, "Bitch, don't run." Tyler started to run, and Freeman began shooting in Tyler's direction. Freeman then shot Gregory three times in the chest, forearm, and shoulder. Freeman got in the car and drove away. Gregory later told the police Freeman had shot him.

Keith Gaddis testified he was at his home on November 8, 2000, when he heard someone calling for help and saw Gregory on his porch. He saw that Gregory had been shot and called an ambulance for him. After the ambulance came, Gaddis saw a blue and black jacket and drops of blood on the stairs.

Tyler testified he came to court with Gregory on November 8th. He saw Gregory and Freeman arguing in the hallway. He heard Freeman say to Gregory, "I take care of mine in the street. I don't run to the people." Tyler moved away from them because he could tell they were getting

angry. Tyler and Gregory proceeded to leave the courthouse, and Tyler saw Freeman standing outside. Gregory and Freeman said a few things to each other, then Freeman walked away. Tyler confirmed Gregory's account of leaving the courthouse, then seeing Freeman jump out of the car. Freeman told them not to run. Tyler saw Freeman going towards his waistband, and he started to run. He heard two shots, a short delay, then three more shots. Tyler later identified Freeman in a lineup.

Chicago Police Officer John Bryja testified he responded to the scene where Gregory was shot. Gregory told him, "Freeman did it. Charles (sic) Freeman shot me." Tyler directed Officer Bryja to the location of the shooting, where he found five spent shell casings on the sidewalk. An evidence technician recovered the shells as well as Gregory's jacket.

The state rested, and the defense moved for a directed verdict. The judge denied the motion.

Kimberley Cammon testified she was Gregory's girlfriend in June 2000. On June 27, 2000, Gregory was hurt and went to the hospital. When Cammon visited him two days later, he told her some guys jumped on him, but he did not know who did it. He said, "he know Joe [Freeman] did not do it, but somebody is going to pay, he said, and it's going to be Joe. He is going to come off five stacks, which is $5, 000." Cammon said that meant Joe would have to come up with $5,000. She said she and Gregory drifted apart after the incident in June 2000 and were no longer together. Cammon's aunt was dating

Freeman.

Robert Nemzin, Freeman's attorney, testified to a conversation with Gregory at the courthouse on November 8, 2000. He saw Gregory in the hallway outside the courtroom and approached him. No one else was present during the conversation. Nemzin said Gregory told him, "There were two forms of compensation. Either, one, your client can go to the joint, or the other is open for negotiation. What's the deal?" Gregory then got into the elevator. Nemzin told Freeman Gregory had asked for money and reported the incident to the assistant state's attorney. On November 14, 2001, Nemzin was present in the jury room for a conversation between Gregory and Peter Hickey, Freeman's other attorney. Gregory told Hickey Nemzin had set him up to be shot by distracting him.

Defense counsel introduced into evidence as Defendant's Exhibit No. 2 a McDonald's receipt given to Nemzin by Freeman's brother in early 2001. The defense also introduced a second McDonald's receipt, Defendant's Exhibit No. 3, obtained by Nemzin as part of his investigation on December 18, 2001. The receipt was from the same McDonald's at 35th and Indiana.

Freeman testified he went to the courthouse on November 8, 2000, for a court appearance at about 10 a.m. After he appeared before the judge, he went into the hallway and saw Gregory. Gregory asked him if he wanted to make a deal with the case, and Freeman said no. Freeman then conversed with his attorney and saw Nemzin talking to Gregory. Freeman left the courthouse and began

walking north to his car in the parking lot of Popeye's restaurant. He saw Gregory, and Gregory asked him again if he wanted to make a deal. Freeman said no and left to drive to his brother's house on 29th Street and King Drive. On the way, he stopped at a McDonald's restaurant on 35th and Indiana. He received a receipt at the drive-through window. Freeman identified Defendant's Exhibit No. 2 as his McDonald's receipt. The receipt was dated November 8, 2000, at 11:03 a.m. After Freeman was arrested on December 13, 2000, he asked his brother to give the receipt to his attorney.

The parties stipulated that a manager from the McDonald's restaurant at 35th and Indiana would testify the November 8th receipt was, in fact, a McDonald's receipt.

Following closing arguments, the court found Freeman guilty of attempt first degree murder. At the hearing on Freeman's motion for a new trial, Joe Brooks, Gregory's uncle, testified. Brooks said he saw Gregory near Monroe and Wilcox on November 8, 2000. Gregory was bleeding, saying he had been shot. Brooks took Gregory into his apartment and told someone to call the police. Gregory told Brooks he had met Tyler on the street after getting off the bus. Three weeks later, Gregory came to see Brooks to get his jacket. Gregory told Brooks he did not know who had shot him.

Barry Spector testified he was an attorney engaged by Freeman's family to review the trial transcript and prepare some post-trial motions for Freeman. On April 25, 2002, he received a letter from Gregory dated April 21,

2002. Spector visited Gregory at Mt. Sterling at Western Illinois Correctional Center. On June 24, 2002, Gregory came to Spector's office. Gregory told Spector he knew he was wrong when he said Freeman shot him. He said a person named Bam-Bam had shot him. He talked about how he had lived his life the wrong way, and he didn't want to see an innocent person go to jail. Gregory said no one had threatened him or forced him to testify or make a statement.

The court denied the motion for a new trial. At the sentencing hearing, Detective Steven Schorsch testified in aggravation. Detective Schorsch said he spoke with Gregory on July 1, 2000, about the beating on June 27, 2000. Gregory said he was beaten outside his girlfriend's building by a "dark skinned male black," and another male black who he knew by the name of Shortie B. Gregory got hit on the back of the head with an object, and he turned around and saw Freeman with two baseball bats in his hand. Freeman hit him again, then began beating him with one of the bats. The three offenders continued to beat Gregory and took his money. They then put him in a garbage can, after which Gregory escaped.

The court noted Freeman's prior finding of delinquency as a juvenile and prior conviction for attempt first degree murder in 1993. Following the hearing, the court sentenced Freeman to 25 years in prison.

DECISION

I. Bias by Trial Judge

Freeman contends he did not receive a fair trial because the trial judge continuously interrupted defense counsel's closing argument and questioned witnesses at the post-trial hearing. Although he did not raise these contentions in his motion for a new trial, we may consider them notwithstanding the waiver doctrine if the defendant's objections are to the trial court's conduct in a bench trial. People v. Nevitt, 135 Ill. 2d 423, 455 (1990).

In a criminal trial, the defense counsel must have the opportunity to argue the defendant's case. People v. Smith, 205 Ill. App. 3d 153, 156-57 (1990). Although the closing argument is not evidence, the trial judge has a duty to be attentive, patient, and impartial. Smith, 205 Ill. App. 3d at 157.

After allowing the state to give its closing argument uninterrupted, the trial judge in this case interrupted the defense attorney's argument several times. The defense attorney asked the court to put aside the fact that a witness to another case was harmed:

> "[DEFENSE COUNSEL]: * * * That's a terrible thing to have a witness harmed or threatened. But --
>
> THE COURT: Shot in this case.
>
> [DEFENSE COUNSEL]: Terrible thing. Terrible thing."

The trial transcript goes on for seven pages of argument before the court again interrupted the defense attorney,

when he referred to Kimberley Cammon's baby with Gregory:

> "[DEFENSE COUNSEL]: Well, judge, you heard her say today when the State asked about that, she said that never happened. You know, he supported the baby -- strike that.
>
> THE COURT: He never supported the baby. She never would have a paternity test done on the baby. He never supported him while they were living together, and didn't support them after they broke up.
>
> [DEFENSE COUNSEL]: And she said the reason why is because he didn't have a job."

Next, defense counsel discussed Freeman:

> "[DEFENSE COUNSEL]: Joe Freeman gets on the witness stand and tells you that a couple days after being arrested in December, he's reconstructing the day's events in his mind.
>
> THE COURT: Counsel, he said he didn't know. Whether he doesn't know or not, please don't put words in his mouth. You may argue."

Defense counsel then discussed the McDonald's receipt that was submitted as evidence of Freeman's alibi. There was an extended discussion between the defense attorney and the judge as to the significance of the second

receipt in evidence. Defense counsel explained Nemzin obtained the second receipt to aid the judge in reading the first receipt because the first receipt was in a dilapidated condition.

The defense then argued that Gregory and Tyler had a chance to speak with each other after the shooting when Gregory was on a stretcher. The court interrupted:

> "THE COURT: Did you hear the officer say he was separated and couldn't come inside the tape?
>
> [DEFENSE CONSEL]: I did hear him say that, Judge.
>
> THE COUKT: So, is the officer the [sic] lying?
>
> [DEFENSE COUNSEL]: Yes. Yes.
>
> THE COURT: As long as everyone is lying.
>
> [DEFENSE COUNSEL]: * * * Well, come on, Judge, he swore to it, and he's swearing to this. It's not a minor inconsistency.
>
> THE COURT: So the names of the police officers who approached --
>
> [DEFENSE COUNSEL]: That's got nothing to do with my argument.
>
> THE COURT: The witness never approached one

another, that's all a lie?

[DEFENSE COUNSEL]: No, I'm not saying that's a lie. What I am saying is that either he, under oath, swore to that content of that report, and then under oath swore in this courtroom.

THE COURT: Okay."

Finally, the court interrupted the defense counsel's argument to clarify whether Gregory said that Nemzin set him up to be shot.

Freeman compares this case to People v. Heiman, 286 Ill. App. 3d 102, 112-113 (1996), where the court remanded for a new trial after the trial court interrupted the defense's closing argument 45 times. The court's sarcastic comments during the testimony, as well as repeated interruptions and arguments with the defense counsel during his closing argument, showed the court had already decided the case before hearing the full argument. Heiman, 286 Ill. App. 3d at 112-113.

In contrast, here, the court allowed the defense attorney to get through most of his argument uninterrupted. The judge's interruptions were largely to clarify confusing or inaccurate statements by the defense attorney, and the judge did not exhibit any obvious bias against the defense case during the argument.

Freeman contends the trial court showed bias towards him when the trial judge stated in her ruling:

> "Shot in the chest on the streets of Chicago, let's pin it on a man I have already pinned a bogus crime on. Talk about preponderous? [sic] That is the most absurd argument I have ever heard," and
>
> "You bet [defendant] was upset with somebody, in his words, who put a case on him that he didn't do, or that his girlfriend's cousins, sisters, uncles, aunts, girlfriend's cousin wants to put it, he was upset."

Rather than a showing of bias by the trial court, we find the comments reflected the court's findings with respect to the credibility of the witnesses. Given the conflicting testimony as to Cammon's relationship with defendant's girlfriend, the judge's comment was not unreasonable.

Freeman also contends the trial court improperly questioned two witnesses during the post-trial hearing.

The trial court may pose questions to witnesses for the purpose of clarifying ambiguities or to help elicit the truth. People v. Johnson, 327 Ill. App. 3d 203, 205 (2001). The propriety of judicial examination of witnesses rests largely in the discretion of the trial court, particularly where the defendant is tried without a jury and the danger of prejudice is lessened. Johnson, 327 Ill. App. 3d at 205.

First, the court extensively questioned Brooks about when Gregory told him he had met Tyler on the street, and when he said he did not know who shot him. Freeman

contends the trial judge attempted to impeach Brooks, improperly assuming the role of prosecutor.

On direct examination Brooks said that after the shooting at his apartment Gregory told him he met Tyler on the street when he got off the bus. Gregory told Brooks three weeks later that he did not know who shot him. On cross-examination, Brooks said he did not know when Gregory met Tyler; it could have been earlier in the day near the courthouse. The court questioned Brooks as to whether he knew when Gregory met Tyler and determined Brooks did not know. The judge then questioned Brooks about when Gregory told him he did not know who shot him, determining it was three weeks later. The judge pointed out that the wording in Brooks' affidavit indicated both conversations with Gregory took place after the shooting. The judge also asked Brooks if he could read because he testified earlier he borrowed defense counsel's glasses to read his affidavit.

During Spector's testimony, the trial court interrupted to question Spector regarding his conversation with Gregory, alone with no prover, while Spector was representing Freeman. Spector explained he was not acting as Freeman's attorney at that time but was an investigator. Nemzin and Hickey were to continue to represent Freeman. The court also interrupted defense counsel during his argument at the post-trial hearing, when defense counsel referred to Gregory's conversation with Nemzin in the hallway. The court said whether or not the attempted shakedown took place did not affect the guilt or innocence of Freeman with respect to the attempt murder.

We find the judge did not act improperly in questioning Brooks and Spector and interrupting defense counsel during the post-trial hearing. Brooks' testimony was confusing and contradictory, and the court attempted to clarify it. Given the fact that another of Freeman's attorneys, Nemzin, testified during the trial to a conversation with the victim, the judge questioned Spector with regard to his potential conflict and conversation with the victim. Moreover, these events took place not at trial, but at a post-trial hearing on defendant's motion for a new trial. Motions for new trial on grounds of newly discovered evidence are not looked upon favorably and are subject to the closest scrutiny. People v. Williams, 295 Ill. App. 3d 456, 462 (1998). We see no error in the trial judge's conduct.

II. Ineffective Assistance

Freeman contends he received ineffective assistance of counsel when Nemzin testified as a defense witness while continuing to represent Freeman at trial. Freeman contends this is a per se conflict or interest which violates Rule 3.7 of the Illinois Rules of Professional Conduct:

> "A lawyer shall not accept or continue employme in contemplated or pending litigation if the lawy knows or reasonably should know that the lawyer may be called as a witness on behalf of the client." 134 Ill. 2d R. 3.7 (a).

We evaluate ineffective assistance of counsel claims

using the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984): (1) whether counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. People v. Jones, 322 Ill. App. 3d 675, 679 (2001). We need not decide if counsel's performance was deficient if the ineffective assistance of counsel claim can be disposed of on the ground that the defendant did not suffer prejudice. Jones, 322 Ill. App. 3d at 679.

The right to the effective assistance of counsel is a fundamental right and entitles an accused to the undivided loyalty of his counsel. People v. Lawson, 163 Ill. 2d 187, 208-209 (1994). The right prohibits the accused's attorney from representing conflicting interests or undertaking the discharge of inconsistent duties. Lawson, 163 Ill. 2d at 209. An attorney may testify in a case in which he is engaged only when the trial court, in its discretion, deems it necessary. People v. Gully, 243 Ill. App. 3d 853, 859 (1993).

We agree Nemzin should have withdrawn as Freeman's attorney when he realized he would be called as a witness to the conversation with Gregory. However, there was no prejudice to the defendant in this case. Nemzin testified favorably on Freeman's behalf by testifying to a conversation in which Gregory offered to drop the charges in exchange for money. During pre-trial motions, the court ruled that Nemzin would be excluded from the courtroom during Gregory's testimony. Freeman's other attorney, Peter

Hickey, conducted the cross-examination of all the State's witnesses, as well as direct examination of most of the defense witnesses, including Nemzin. Hickey did the opening statement and closing argument for the defense. The trial judge also asked Freeman if he objected to Nemzin acting as a witness and his attorney, and Freeman said he did not. There is less potential for harm where, as here, Freeman received a bench trial rather than a jury trial. We find Nemzin's acting as a witness in this case did not constitute ineffective assistance of counsel.

Freeman also cites as error the following actions by his attorneys: (1) during the sentencing hearing, defense counsel asked an open-ended question on cross-examination that helped the state's case; (2) defense counsel only took a few moments to review the pre-sentence investigation report during the sentencing hearing; (3) except for Freeman's allocution, defense counsel presented no mitigation evidence at the sentencing hearing; (4) counsel failed to call Freeman's brother as an alibi witness; (5) counsel failed to introduce telephone records to verify that Freeman called his attorney the morning of the incident; and (6) counsel failed to object to the admission of a prior consistent statement by Gregory to police identifying Freeman as the shooter.

It is clear from the record that defense counsel reviewed the pre-sentence investigative report because he pointed out an error in the defendant's record of prior convictions. Further, defense counsel introduced the McDonald's receipt to establish Freeman's alibi. As to the other allegations; there is a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance, that the challenged actions would be considered sound trial strategy. Jones, 322 Ill. App. 3d at 679. Trial strategy or not, Freeman is not able to overcome the second prong of the Strickland test--that but for counsel's actions, he probably would not have been found guilty or given the sentence he received. None of the errors alleged by Freeman prejudiced him to the extent that the result of the proceedings might have been different.

III. Excessive Sentence

Freeman contends his sentence was excessive where the court improperly considered a separate pending charge in aggravation that had not been proved and later was dismissed by the state.

The trial court has broad discretionary powers in imposing a sentence, and we grant great deference to the sentencing decision because the trial court is in a better position to weigh the relevant factors. People v. Stacey, 193 Ill. 2d 203, 209 (2000). We will not alter a sentence absent an abuse of discretion by the trial court. Stacey, 193 Ill. 2d at 209-10. "[A] sentence within statutory limits will be deemed excessive and an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." Stacey, 193 Ill. 2d at 210.

Here, defendant's sentence of 25 years fell within the statutory range and below the maximum penalty. Attempt first degree murder is a Class X felony, carrying a

sentencing range of 6 to 30 years. 720 ILCS 5/8-4(c)(1) (West 2002); 730 ILCS 5/5-8-1(a)(3) (West 2002).

The trier of fact in a sentencing hearing may consider any evidence that is reliable and relevant, including evidence of crimes with which the defendant has been charged but not convicted. People v. Sanchez, 115 Ill. 2d 238, 277 (1986). The sentencing hearing is intended to be a wide-ranging inquiry into every identifiable aggravating or mitigating factor, so the formal rules of evidence do not apply. Sanchez, 115 Ill. 2d at 277.

Here, Detective Schorsch testified to the circumstances involving Freeman's pending charge of attempt murder against Gregory. It is irrelevant that the charge was subsequently nolle prossed by the State. The trial court did not abuse its discretion in considering this evidence because it was both relevant and reliable. In reaching the sentence, the trial court considered Freeman's prior finding of delinquency as a juvenile for unlawful use of a firearm and a 1993 attempt murder conviction. The court also declined to sentence Freeman to an extended term of 30 to 60 years for which he was eligible. 730 ILCS 5/5-8-2(a)(2) (West 2002); 730 ILCS 5/5-5-3.2(b)(1) (West 2002). Given Freeman's prior convictions and his eligibility for an extended term sentence, the sentence of 25 years was not excessive, and the trial court did not abuse its discretion.

IV. Reasonable Doubt

Freeman next contends he was not proven guilty

beyond a reasonable doubt because the state witnesses' testimony was incredible, confusing, and impeached, and the victim later signed an affidavit recanting his testimony.

When a defendant challenges the sufficiency of the evidence, the relevant question is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Smith, 185 Ill. 2d 532, 541 (1999). We may not substitute our judgment for that of the trial court and will not reverse a conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt or defendant's guilt. People v. Lundy, 334 Ill. App. 3d 819, 825 (2002). It is the trier of fact's responsibility to determine the witnesses' credibility and the weight to be given their testimony. People v. Ortiz, 196 Ill. 2d 236, 258 (2001).

To prove a defendant guilty of attempt first degree murder, the state must prove: (1) the defendant performed an act constituting a substantial step toward the commission of the murder; and (2) defendant possessed the specific intent to kill. People v. Brown, 341 Ill. App. 3d 774, 781 (2003). Firing a gun at a person supports the conclusion that the person doing so acted with the intent to kill. Brown, 341 Ill. App. 3d at 781.

Freeman points to the inconsistencies in the testimony, including whether Tyler was with Gregory at the courthouse, why Gregory and Tyler came to the courthouse, whether Gregory and Freeman were arguing in the hallway,

whether Gregory spoke with Nemzin, and whether Gregory used an alias while in the hospital. Both Gregory and Tyler were convicted felons. Freeman says the trial court unjustifiably ignored Cammon's testimony that Gregory had lied about Freeman beating him in order to extort money from him, Nemzin's testimony that Gregory tried to "make a deal," and Brooks' testimony that Gregory said he did not know who shot him.

The inconsistencies in Tyler's and Gregory's testimony were minor and were not so improbable as to create a reasonable doubt of guilt as a matter of law. After observing the testimony, the trial court specifically found Freeman's testimony was not credible, and Gregory's identification of Freeman as the shooter was credible. The testimony of a single witness, if positive and the witness credible, is sufficient to convict a defendant. People v. Smith, 185 Ill. 2d 532, 541 (1999). Several witnesses, including Freeman, testified that Gregory and Freeman argued at the courthouse prior to the shooting. The trial court did not find Nemzin's testimony incredible, but found whether Gregory had attempted to extort money for dropping the earlier charge was not relevant to whether Freeman was guilty of the shooting in this case.

At the post-trial hearing, the trial court found Brooks' testimony not credible. Brooks testified that Gregory returned to retrieve his jacket, although a police officer testified the evidence technician recovered the jacket and a police photograph of the jacket was introduced at trial. Gaddis testified he saw the jacket on the stairs after Gregory was taken in the ambulance, not after the police

had left, as Freeman contends.

After reviewing the record in the light most favorable to the State, we conclude the court's credibility assessments were well-founded, and a rational trier of fact could have found the essential elements of the crime of attempt murder beyond a reasonable doubt.

CONCLUSION

We affirm the judgment and rulings of the trial court.

Affirmed.

Wolfson, P.J., with Cahill, and Burke, JJ., concurring.